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No. 90-1460

In the Supreme Court of the United States

OCTOBER TERM, 1990

TITKI D. TARASSOUM, PETITIONER

V.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner waived his statutory right to counsel in deportation proceedings.

2. Whether the Board of Immigration Appeals applied the proper legal standard in evaluating petitioner's asylum claim.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Blanco-Comarribas v. *INS*, 830 F.2d 1039 (9th Cir. 1987)	7
Burquez v. *INS*, 513 F.2d 751 (10th Cir. 1975)	6
Garcia-Ramos v. *INS*, 775 F.2d 1370 (9th Cir. 1985)	7
INS v. *Bagamasbad*, 429 U.S. 24 (1976)	8
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)	2–3
INS v. *Lopez-Mendoza*, 468 U.S. 1032 (1984)	4
Johnson v. *Zerbst*, 304 U.S. 458 (1938)	4
Kubon v. *INS*, 913 F.2d 386 (7th Cir. 1990)	7
Michelson v. *INS*, 897 F.2d 465 (10th Cir. 1990)	4
Rodriguez-Rivera v. *INS*, 848 F.2d 998 (9th Cir. 1988)	7

Constitution, statutes and regulations:

U.S. Const.:	
Amend. IV	3
Amend. V	3, 4
Due Process Clause	4
Amend. VI	4
8 U.S.C. 1105a(a)	7
8 U.S.C. 1362	4
8 C.F.R. 242.16(a)	4, 5, 6
8 C.F.R. 292a.2	5

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. D1–D11, the decision of the Board of Immigration Appeals, Pet. App. C1–C19, and the oral decision of the immigration judge, Pet. App. A1–17, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1990. A petition for rehearing was denied on January 11, 1991. Pet. App. E1. The petition for a writ of certiorari was filed on February 14, 1991. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Chad who was admitted to this country as a nonimmigrant exchange student. His authorization to stay in the United States expired on November 4, 1981, and the Immigration and Naturalization Service (INS) subsequently placed him in deportation proceedings. Pet. App. C1–C2.

At the outset of the hearing, the immigration judge asked petitioner if he had received a list of legal aid organizations. Pet. App. B3. Petitioner replied that he had. *Ibid.* The immigration judge then informed petitioner that he had the right to be represented by an attorney at no expense to the government or he could represent himself. *Ibid.* The immigration judge asked petitioner: "Do you understand * * * this right of representation as explained?" *Ibid.* Petitioner replied: "I do, sir." *Ibid.* Petitioner then informed the immigration judge: "I wish to represent myself." *Ibid.*

The immigration judge asked petitioner to raise his hand if something arose during the hearing that he did not understand. Pet. App. B4. The judge also told petitioner that he had the right to present evidence, including witnesses, and the right to question the INS's evidence and witnesses. *Ibid.* Petitioner told the immigration judge that he understood those rights. *Ibid.*

After two continuances, the immigration judge concluded the hearing and announced his oral opinion. He found that the INS had proved petitioner's deportability by "clear, convincing, and unequivocal" evidence and that petitioner was not eligible for asylum or withholding of deportation. Pet. App. A11–A16.

2. The Board of Immigration Appeals (BIA) dismissed petitioner's appeal. Pet. App. C1. Although it noted that "[t]he burden of proof required to establish eligibility for asylum is lower than that required for

withholding of deportation," *id.* at C13–C14 (citing *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)), the BIA found that petitioner was not eligible for asylum because he had no well-founded fear of persecution in Chad. Pet. App. C14. The BIA's conclusion rested on the following findings: petitioner was a student and was never directly involved in politics; he had not been in Chad since March 1976, before political unrest had begun; his father and one of his father's cousins, who were politically active, both died over a decade ago; the group to which petitioner belonged in the United States, the Association of Chad Students, is nonpolitical; when he was summoned home in 1983, petitioner was recalled with all the Chad exchange students in his program; and petitioner had not shown that his inability to renew his passport was anything more than bureaucratic inattention or mishandling by the government of Chad. *Id.* at C15–C16. Because petitioner failed to satisfy the lower burden of proof required for asylum, the BIA reasoned that petitioner had also failed to demonstrate his eligibility for withholding of deportation. *Id.* at C17.

3. The court of appeals affirmed in an unpublished opinion. First, the court held that "sufficient facts were introduced to support the BIA's finding that [petitioner] overstayed his visa." Pet. App. D4. Second, the court held that the INS's initial decision to detain him did not violate petitioner's Fourth or Fifth Amendment rights since it did not result "in prejudice implicating the fundamental fairness of" petitioner's civil deportation proceeding. *Id.* at D6–D7. Third, the court held that the BIA had applied the correct legal standard in reviewing petitioner's applications for asylum and withholding of deportation, *id.* at D8, and that its decision that petitioner was not eligible for either form of relief was supported by substantial evidence—namely, "that [petitioner] left the country in 1976 before the civil war began; was not personally involved in political activities involving the Chad government of

Hissene Habre; and had no living relatives in Chad who were politically active," *id.* at D9.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Moreover, the court of appeals' decision is unpublished and thus is not precedent even in its circuit of origin.

1. Petitioner insists that his decision to waive his statutory right to counsel, 8 U.S.C. 1362, was invalid because it was not "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); Pet. 15. That contention, first raised in petitioner's suggestion of rehearing en banc in the court of appeals, is without merit, for two independent reasons.

a. First, the *Zerbst* waiver standard, which is drawn from the defendant's Sixth Amendment right "[i]n all criminal prosecutions * * * to have the Assistance of Counsel for his defence," 304 U.S. at 462, has no application to petitioner's hearing, because "[a] deportation proceeding is a purely civil action." *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). Nor does the Fifth Amendment's Due Process Clause make waivers of counsel contingent on satisfaction of the *Zerbst* standard. Petitioner's sole authority for that contention is *Michelson* v. *INS*, 897 F.2d 465 (10th Cir. 1990). But in *Michelson* the court *rejected* a pro se alien's petition for review of his deportation order and held that "[w]hile a petitioner is entitled to due process in a deportation proceeding, due process is not equated automatically with a right to counsel." *Id.* at 468.

b. Second, petitioner's challenge to the validity of his waiver presupposes that the immigration judge failed to inform petitioner of his rights as required by 8 C.F.R. 242.16(a). Pet. 16 & n.5. The essential predicate of petitioner's argument does not exist.

BEST AVA

The regulation on which petitioner relies requires the immigration judge to advise the alien of "his right to representation, at no expense to the Government," and of

> the availability of free legal services programs qualified under Part 292a of this chapter and organizations recognized pursuant to § 292.2 of this chapter, located in the district where the deportation hearing is being held.

8 C.F.R. 242.16(a). The regulation further requires the immigration judge to "ascertain that the [alien] has received a list of such [legal services] programs." *Ibid.*

In this case, the immigration judge told petitioner that he had "a right to be represented by an attorney at law of [his] own choice at no expense to the government." Pet. App. B3. The judge also asked petitioner whether he got "a legal aid list." *Ibid.* The judge's question notified petitioner that legal aid programs were available. Petitioner's answer indicated that he had received the list, *ibid.*, and satisfied the regulation's requirement that the judge ascertain that the alien actually received the legal aid list. Petitioner plainly understood the immigration judge's description of his rights: he is an English-speaking student who came to the United States to pursue a Ph.D. in range management, *id.* at A3, B1, and at the time his deportation hearing commenced, he had lived in the United States for more than five years.

Notwithstanding the immigration judge's literal compliance with the regulation, petitioner—for the first time in this Court—faults the judge for not explaining that legal aid organizations must offer "*free* legal services" and for not asking petitioner whether he had tried to obtain counsel. Pet. 17. The regulation requires neither procedure. The legal aid organizations on the list furnished by the INS "provide[] free legal services to *indigent* aliens," 8 C.F.R. 292a.2 (emphasis added); a particular alien has no right to

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free legal services under the regulation. Nor does the regulation require the immigration judge to use the words "free legal services programs" rather than "legal aid," or ask the alien whether he tried to obtain legal counsel. The immigration judge furnished petitioner with all the information to which he was entitled under 8 C.F.R. 242.16(a), and that information provided a sufficient basis for petitioner to make an informed decision whether to represent himself.

Because petitioner validly waived his statutory right to counsel, this case does not present any question regarding the appropriate remedy for a violation of that right.*

2. Petitioner contends that the BIA and the immigration judge failed to recognize that eligibility for asylum requires a lower risk of persecution ("well-founded fear") than does eligibility for withholding of deportation ("clear probability"). Petitioner further contends that he is eligible for asylum under the "subjective component" of the "well-founded fear" standard. Pet. 24–25.

a. The BIA correctly stated that petitioner would be eligible for asylum if he had a "well-founded fear of persecution." Pet. App. C13. It noted that the "well-founded fear" standard is more generous than the "clear probability" standard applied to applications for withholding of deportation. *Id.* at C13–C14. And it cited this Court's decision in *Cardoza-Fonseca*, which differentiates between the two forms of relief. *Id.* at C14. The BIA then evaluated petitioner's asylum claim under the more generous standard. *Id.* at C14–C17. On appeal, the court of appeals determined that the BIA recognized the difference between the two standards

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* Although petitioner claims that the Tenth Circuit, in *Burquez* v. *INS*, 513 F.2d 751, 755 (1975), requires a greater showing of prejudice than other circuits have required, Pet. 22, there is no indication that the lower court applied that standard

and applied the different standards of proof to [petitioner's] case." *Id.* at D8.

Although petitioner appears to concede that the BIA correctly understood the legal standard governing asylum claims, Pet. 25, he contends that the immigration judge (who rendered his opinion before this Court decided *Cardoza-Fonseca*) erroneously judged petitioner's asylum application under the "clear probability" standard, Pet. 24–25. Any error in the immigration judge's oral opinion could not have prejudiced petitioner's asylum claim, however, because the BIA reviewed that opinion. When the BIA undertakes such review, its decision, and not the immigration judge's, is the final order of deportation and only it is subject to review by the court of appeals. *Kubon* v. *INS*, 913 F.2d 386, 387 (7th Cir. 1990) (citing *Rodriguez-Rivera* v. *INS*, 848 F.2d 998, 1002 (9th Cir. 1988)); 8 U.S.C. 1105a(a).

b. Although petitioner acknowledges that the BIA cited the proper standard of review to be applied to asylum claims, he maintains that it did not properly apply that standard to his particular claim. Pet. 25. That fact-bound contention is belied by the BIA's careful dissection of petitioner's claims, Pet. App. C14–C17, and by the court of appeals' determination that "the record indicates that the BIA applied the different standards of proof to [petitioner's] case," *id.* at D8.

Petitioner claims that the BIA "did not apply the subjective component of the 'well-founded fear' test." Pet. 25. As petitioner concedes, Pet. 26 n.10, however, a subjective fear of persecution is not enough to qualify for asylum. A subjective fear must be "well-founded"—*i.e.*, it must have an objective basis proved through documentary evidence or credible, persuasive testimony. *Blanco-Comarribas* v. *INS*, 830 F.2d 1039, 1042–1043 (9th Cir. 1987); see *Garcia-Ramos* v. *INS*, 775 F.2d 1370, 1374 (9th Cir. 1985). In this case, the BIA found no objective basis for petitioner's fear, Pet. App. C14–C17, and hence did not address the "subjective component" of the "well-founded fear" test. "As a general rule

courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach." *INS* v. *Bagamasbad*, 429 U.S. 24, 25 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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